Supreme Court, U.S.
FILED
001499 MAR 22 2001
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No.

In the

Supreme Court of the United States

ANTONIO AUGUSTUS; RAYMOND BEEDLOW; WILLIAM GRADY; MICHAEL J. KNAPIK; M J MCLAUGHLIN; WALTER POTOSKY; SAM TANNENBAUM,

Petitioner,

versus

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA;

AND

PENN CENTRAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Carla M. Tricarichi
Tricarichi & Carnes
Suite 1020
614 Superior Ave NW
Cleveland, Ohio 44113-1306
216-861-6677

Bernard S. Goldfarb
Counsel of Record
55 Public Square
Suite 1500
Cleveland, Ohio 44113
216-696-0606

Curry & Taylor (202) 393-4141/ussupremecourt@hotmail.com

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN FAILING TO APPLY THE DOCTRINES OF REPUDIATION AND FUTILITY AS ARTICULATED BY THIS COURT IN VACA V. SIPES, 386 U.S. 171, 87 S.CT. 903 (1967) AND GLOVER V. ST. LOUIS – SAN FRANCISCO RAILROAD CO., 393 U.S. 324, 89 S.CT. 548 (1969)?

II. DID THE COURT OF APPEALS ERR IN DETERMINING THAT THE SURFACE TRANSPORTATION BOARD MAY SUMMARILY AFFIRM AN ARBITRATION PANEL DECISION WITHOUT THE BOARD'S DEMONSTRATION THAT ITS DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in the case of *Antonio Augustus, et al. v. Surface Transportation Board, et al.*, is unreported and set forth in the Appendix hereto (App. 1a).

The Surface Transportation Board Decision, STB Finance Docket 21989 (SUB-NO. 3), Pennsylvania Railroad Company Merger, New York Central Railroad Company (Arbitration Review) decided September 2, 1998, is unreported and set forth in the Appendix hereto (App. 13a).

A matter before the Arbitration Committee established under Section 1(e) of the Merger Protection Agreement of November 16, 1964, Michael J. Knapik, et al. (Claimants) v. Penn Central Co. (Carrier) dated June 22, 1992, is unreported and set forth in the Appendix hereto (App. 29a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit affirming the decision of the Surface Transportation Board was entered on December 22, 2000 (App. 1A). This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED.

Interstate Commerce Commission Act – 49 U.S.C.A. Section 5(2)(f) as revised/recodified under 49 U.S.C. 31126.

STATEMENT OF THE CASE.

The Petitioners were railroad workers, most of whom had worked for the railroad their entire working lives. They sought benefits to which they were entitled under the 1964 "Agreement for Protection of Employees in the Event of a Merger of the Pennsylvania and New York Central Railroads." The Carrier [hereinafter "Railroad", "Carrier," or "Penn Central"], refused to provide those benefits. The Merger Protection Agreement [hereinafter "MPA"], was entered into between the Carriers, the New York Central and Penn Central Railroads. The MPA covered all employees who worked for either Carrier between January 1, 1964 and the date of consummation of the merger. Such employees were defined as "present employees." The MPA provided in part that notwithstanding the merger:

> None of the present employees of either said carrier shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto at anytime during such employment.

The phrase, "placed in a worse position," extended without time limitation, protection previously afforded railroad employees under Section 5(2)(f) of the Interstate Commerce Action and Section 6(a) of the Washington D.C. Merger Protection Agreement of May 1936 [hereinafter the "Job Protection Agreement" or "JPA"]. The first portion of the above quoted passage from the MPA ("None of the

present employees of either said carrier shall be deprived of employment..."), presents a significant addition to the protection that had been previously been established by the Interstate Commerce Act and the JPA.

The MPA contained additional benefits and incorporated by reference all the protection set forth in the JPA. The benefits described in these two documents include the following:

> 1. In the event that the employees pre-merger compensation exceeded its post-merger compensation, they were entitled to supplemental wages.
> 2. An employee affected by a coordination would "not be deprived of benefits attaching to his previous employment, such as free transportation, pensions, hospitalization, relief, etc."

Petitioners were hired by the New York Central Railroad on various dates between 1943 and 1951. As New York Central employees, they worked at any number of locations operated by the Cleveland Union Terminal Company [hereinafter "CUT"] and the New York Central Railroad. CUT was used primarily by the New York Central Railroad, which eventually controlled approximately 93% of CUT stock. Petitioners worked as brakemen, also known as switchmen, coupling and uncoupling railroad cars.

The Brotherhood of Railroad Trainmen [hereinafter "BRT"], negotiated an agreement with the Railroad, referred to as the "Top and Bottom Agreement", effective February 16, 1965, which provided for seniority roster consolidation of the New York Central Cleveland Terminal District Yard Service Employees and CUT yard service employees. Under the Top and Bottom Agreement, all CUT employees were

placed in the New York Freight Yard Roster receiving New York Central seniority date of September 10, 1964 and denied the right to use significantly earlier seniority dates. Further, the Top and Bottom Agreement, while it provided for roster consolidation, never stated that the Petitioners were New York Central employees and never stated that Petitioners were covered by the MPA. For years after the announcement of the merger, but before its effective date, the Petitioners pleaded with the Railroad to confirm their status as New York Central employees covered by the MPA. The Railroad refused to provide the Petitioners with any such confirmation.

The Pennsylvania and New York Central Railroads merged on February 1, 1968. The Petitioners were furloughed on February 25, 1968. They were directed to stand for work in the New York Central Freight Yard pursuant to the 1965 Top and Bottom Agreement. Petitioners were reluctant to follow this dictate from the Railroad for the following reasons:

1. Given the Railroad's repeated refusal to confirm their status as New York Central employees, Penn Central effectively denied them coverage under the MPA altogether.
2. Because of the Carrier's position that CUT employment was not synonymous with New York Central employment, Petitioners realized that the acceptance of work in the new Penn Central Freight Yard on or after February 25, 1968, would leave them outside the scope of the MPA coverage since MPA coverage was limited to those who had worked for either the Pennsylvania or the New York Central Railroad between the dates of January 1, 1964 and February 1, 1968.

3. Even assuming Penn Central recognized their coverage under the MPA, a September 10, 1964 seniority date imposed upon the Petitioners by the Top and Bottom Agreement placed them outside the protection of the key MPA provision: wage supplementation in the event pre-merger compensation exceeded post-merger compensation.

4. The September 10, 1964 seniority date dictated by the Top and Bottom Agreement stripped the Petitioners of their seniority. As New York Central employees, their seniority should have been based on their original date of hire as recognized by the Railroad Retirement Board.

5. Petitioners were not required to apply for jobs in the freight yard, since those jobs did not constitute comparable work and were of a different class and craft. In this regard, the MPA prohibited employees from being placed in a worse position with respect to working conditions.

6. The Petitioners knew with a seniority date of only September 10, 1964 it would be impossible for them to obtain permanent full-time work in the freight yard.

The acceptance of freight yard jobs would have constituted a waiver of all of the Petitioners' rights and the benefits to which they were entitled. That would have meant at best only partial MPA coverage and a reduced seniority date; at worse, no coverage whatsoever under the MPA. Some of the railroad workers stood for work. However, confronted with this lack of options, Petitioners concluded they had no choice but to reject mark-up in the freight yard, and fight for the job protection they had earned after 15 to 25

years of employment with the railroad, through an action in the District Court.

Subsequent to the furlough, but before filing suit, Petitioners and the Carrier continued to exchange communication concerning the Petitioners' employment status. On numerous occasions, the Petitioners attempted to obtain clarification from the Carrier as to whether they were covered by the MPA.

A majority of the claimants did return to work for the Carrier. However, even as to those workers, Penn Central refused to provide the benefits mandated by the MPA. None of the agreements were implemented with regard to merger protection benefits for any of the employees – both the Petitioners [also referred to as the Beedlow Group] and the other claimants who marked-up [also referred to as the Steimle Group], but received no regular work.

Both the Steimle Group and the Beedlow Group [also referred to as the Petitioners] filed suit in District Court, Northern District of Ohio in 1969 against the Penn Central Railroad and the United Transportation Union.

The case proceeded to trial in bifurcated form before a jury in 1976 in the District Court. At the close of the claimants' case, during the first stage of trial, the Court, upon Motions for Directed Verdict, made several rulings, that the claimants as a matter of law:

> ...are employees of the New York Central Railroad as the term is defined in the merger protection agreement, and as that term applies to the job protection agreement and their job guarantee entitlement under the merger protection agreement.

> ...were entitled to the full benefits of the job protection agreement based upon their combined wages of CUT and their New York Central work, and were entitled to this not only as of 1969 but at all times prior thereto.

The District Court further found that any subsequent proceeding "is best tried in the context of a damage question." In 1979, the Court issued an order referring the cases to arbitration.

At the arbitration in 1990 the claimants presented overwhelming documentary and testimonial evidence of the Carrier's failure to comply with the terms of the MPA. The arbitration award divided the claimants into two categories: those who returned to work and those who did not. Citing no case law or prior rulings of the ICC, the arbitration panel denied benefits to both categories of workers. As to the Petitioners who did not return to work, without citing any authority, the arbitration panel denied the applicability of anticipatory breach in the context of collective bargaining. The arbitration panel denied coverage to the claimants who did not return to work because those claimants failed to pursue illusory jobs, standing for which would have been a futile act, as proven by the experience of those who did return to work and received no jobs and no wage guarantees.

In a decision issued in December of 1998, the Surface Transportation Board [hereinafter "STB"], reversed the arbitration panel in part and held that denial of benefits to those who returned to work constituted egregious error and failure to observe the imposed labor conditions. (STB Decision pgs. 5, 6). Further, the STB held that the Carrier presented no evidence to refute the voluminous evidence of injury submitted by the Petitioners. (STB Decision pgs. 7, 8)

In sharp contrast, with reference to those who did not return to work, the STB simply repeated the arguments of the arbitration panel with no analysis. Having found that the panel had egregiously erred with respect to the Steimle Group, the STB then adopted, without any explanation, the panel's flawed reasoning with respect to the Beedlow Group (the Petitioners).

The Court of Appeals, in affirming the STB held that the Administrative Procedure Act did not require the STB to independently review Petitioners' arguments. The Circuit Court found that the STB may adopt *in toto* the reasoning of the arbitration panel. The Circuit Court Decision did not address the Petitioners' argument that the doctrines of repudiation and futility apply in excusing the Petitioners' failure to mark-up for non-existent work.

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW IGNORED THE DOCTRINES OF REPUDIATION AND FUTILITY AS LEGITIMATE BASES FOR THE PETITIONERS' REFUSAL TO RETURN TO WORK.

For years after the enactment of the MPA, but before its implementation, the Claimants had begged for recognition as covered employees under the MPA. The Carrier in turn had steadfastly refused to apply the 1964 MPA to the Petitioners. The Petitioners attempted to pursue their remedies by working and grieving for four years between 1964, the year the MPA was executed, and the time of the furlough in 1968, but to no avail. None of the implementing agreements executed ever acknowledged that the CUT employees were protected under the 1964 MPA. In fact, the Railroad was only forced to include the Claimants under the

terms of the MPA when the District Court so ruled, after the fact in 1976. Therefore, at the time the action was occurring, the Petitioners received recall notices from the employer, the Carrier, which had ignored for years the grievances that had been filed on this issue. The Railroad's actions constituted repeated repudiations of the employment relationship of the Petitioners and of the contractual relationship between the Petitioners and the Railroad. The actions of the Carrier constituted anticipatory breach of its contractual obligations under the MPA.

This Court in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) held that an employee may be excused from exhausting certain remedies when the conduct of the employer amounts to repudiation of the contractual procedures. *See also Glover v. St. Louis – San Francisco Railway Co.*, 393 U.S. 324, 89 S.Ct. 548 (1969).

For the Petitioners, marking up for work that did not exist under the seniority rights they had been given, for the purpose of filing wage guarantees which would never be paid, constituted futile acts. By the time of the last recall notice in December 1969, twenty months after they had been furloughed, Petitioners had seen how the Claimants who had marked-up for work in the Steimle Group had been treated. The Steimle Group had marked-up for work, filed grievances, and been told that the 1964 MPA did not apply to them and therefore they had no job and no guarantee. The futility of returning to work under the terms of the MPA which the Railroad had said did not apply to them, was compounded by the non-comparable work and relatively dangerous jobs allegedly available to them in the freight yard. Again, in this context, forcing the Petitioners to comply with the last recall notice would have been a futile act as demonstrated by the collective experience of the Steimle Group.

The court in United Slate, Tile & Compensation Roofers, Damp & Waterproof Workers Association Local 307 v. G&M Roofing & Sheet Metal Co., Inc., 732 F.2d 495, 501 (1984), held that any failure to report to work or to exhaust administrative remedies is excused where such action would be futile. *See also Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (1974), *Atkins v. Louisville and Nashville Railroad*, 819 F.2d 644 (1987).

Whether referred to as repudiation or futility, the Circuit Court's affirmance of the Surface Transportation Board, essentially held that the Petitioners were required to report to work to non-existent jobs and illusory wage guarantees. The decision of the Circuit Court should be reversed and remanded to the STB with instructions to apply the doctrine of repudiation and futility to the facts presented.

II. THE COURT OF APPEALS SUMMARY AFFIRMANCE OF AN ARBITRATION DECISION IS NOT SUPPORTED BY THE DECISIONAL LAW REQUIRING ANY SURFACE TRANSPORTATION BOARD DECISIONS TO BE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In reviewing the arbitration decision, the Surface Transportation Board did not discuss or analyze the evidence regarding the Petitioners. Although the Surface Transportation Board found the testimony of the only Petitioner credible and persuasive, the STB failed to articulate any explanation for the conclusion it reached in denying all benefits to the Beedlow Group. In sharp contrast, the STB conducted a searching and thorough review of the evidence regarding the claims of the Steimle Group, that is those Claimants who returned to work. In that part of its analysis, the STB held that the arbitration panel had erred egregiously and failed to observe the imposed labor

conditions in summarily denying benefits to the Claimants in the Steimle Group. In vacating the complete denial of benefits to the Steimle Group, the STB reviewed and repeatedly impeached the testimony of the Carrier's only witness. Further, the STB noted the absence of any evidence submitted by the Railroad to demonstrate any justifiable reason for the Claimants' loss of jobs and income. The STB further criticized the arbitration panel for failing to mention "the voluminous evidence of injury," and as a result the STB then appropriately vacated the arbitration award with respect to the Steimle Group. However, the STB proceeded to commit the same egregious errors of the arbitration panel, by ignoring the voluminous evidentiary and documentary evidence presented on behalf of the Beedlow Group. The STB not only failed to demonstrate substantial evidence upon which to reject the claims of the Beedlow Group, the Petitioners herein, the STB failed to demonstrate any evidence upon which to deny those claims.

In *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 83 S.Ct. 239 (1962), this Court emphasized that where there are no findings and no analysis to justify the choice made by the Commission, then there is no indication of the basis upon which the Commission exercised its expert discretion. Further, the agency must speak through the language of its order and the grounds invoked therein. Quoting *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1947), the Burlington court stressed, "If those grounds are inadequate or improper, the [reviewing] court is powerless to affirm the administration action." Further, the agency cannot now, through "post hoc rationalizations for agency actions" seek to justify or salvage a finding with no basis. *Id.* at 246.

The Circuit Court cites the case of *National Treasury Employees Union v. Federal Labor Relations Authority*, 802 F.2d 843 (1986), for the premise that the agency is not

required to provide detailed reasoning for its decision as long as its conclusions are discernable. In this instance, the court merely echoes the unreasoned portion of the opinion by the STB. The STB was clearly capable of giving reasoned opinions and had done so in a thoughtful manner with reference to the Steimle Group. However, with respect to the Petitioners, it offered no rationale whatsoever. The decision of the Circuit Court should be reversed as contrary to the court's holding in *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 83 S.Ct. 239 (1962) requiring agency decisions to be supported by substantial evidence.

CONCLUSION.

For all of the reasons identified herein, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Sixth Circuit and ultimately to vacate, reverse, and find that the Petitioners were not required to take futile actions to preserve their right to benefits and that the Surface Transportation Board's affirmance of the denial of benefits to the Petitioners was devoid of substantial evidence.

Petitioners' urge this Court to grant this petition of certiorari and ultimately to reverse the Circuit Court and vacate the Surface Transportation Board's affirmance of the arbitration award and to make an affirmative finding that the Petitioners are entitled to benefits under the Merger Protection Agreement. In light of the tortured legal history and age of this case, the Petitioners exhort this Court to fashion an extraordinary remedy. This prayer stems from the complete failure of the arbitral and administrative processes, as recognized in *Nemitz v. Norfolk and W. Ry. Co.*, 436 F.2d 841 (1971).

Respectfully submitted,

Carla M. Tricarichi
Tricarichi & Carnes
614 Superior Avenue, N.W.
Suite 620, Rockefeller Bldg.
Cleveland, OH 44113
(216) 861-6677

Bernard S. Goldfard
Attorney at Law
55 Public Square
Suite 1500
Cleveland, OH 44113
(216) 696-0606

Counsel for Petitioners

(any footnotes trail end of each document)

No. 99-3014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTONIO AUGUSTUS; RAYMOND BEEDLOW; WILLIAM GRADY; MICHAEL KNAPIK; KATHLEEN KOCK, as personal representative on behalf of Mike McLaughlin; MICHAEL POTOSKY, as personal representative on behalf of Walter Potosky; PEARL TANNENBAUM, as personal representative on behalf of Sam Tannenbaum,
Petitioners,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, Respondents; PENN CENTRAL CORPORATION, Intervenor.

December 22, 2000, Filed

COUNSEL:
For ANTIONIO AUGUSTUS, RAYMOND BEEDLOW, KATHLEEN KOCK, MICHAEL POTOSKY, PEARL TANNENBAUM, Petitioners: Carla M. Tricarichi, Tricarichi & Carnes, Cleveland, OH.

For ANTIONIO AUGUSTUS, RAYMOND BEEDLOW, WILLIAM GRADY, MICHAEL KNAPIK, Petitioners: Bernard S. Goldfarb, Cleveland, OH.

For WILLIAM GRADY, MICHAEL KNAPIK, Petitioners: Carla M. Tricarichi, David Fleshler, Tricarichi & Carnes, Cleveland, OH.

For SURFACE TRANSPORTATION BOARD, Respondent: Louis Mackall, Marilyn R. Levitt, Surface Transportation Board, Washington, DC.

For UNITED STATES OF AMERICA, Respondent: John J. Powers, III, Robert J. Wiggers, U.S. Department of Justice, Washington, DC.

For PENN CENTRAL CORPORATION, Intervenor: William F. Kershner, Pepper, Hamilton & Scheetz, Berwyn, PA.

JUDGES:
BEFORE: MARTIN, Chief Judge; GUY and COLE, Circuit Judges.

OPINION BY:
R. GUY COLE, JR.

OPINION:

R. GUY COLE, JR. Petitioners appeal a decision of the Surface Transpc tation Board affirming an arbitration panel's ruling denying benefits to Petitioners pursuant to a 1964 railroad merger labor protection agreement. For the following reasons, we **AFFIRM** the decision of the Board.

I. BACKGROUND

This regrettably protracted dispute has been before this Court for only a fraction of its extended life. In 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company ("N.Y. Central") agreed to a merger that resulted in the formation of the Penn Central Transportation

Company ("Penn Central" or "Carrier"). On May 20, 1964, the Brotherhood of Railway Trainmen ("BRT") and the two merging carriers entered into an agreement for the protection of employees affected by the proposed merger. Only the two merging carriers signed this Merger Protection Agreement ("MPA"), which made no reference to employees of any subsidiary companies owned by the two carriers. Under the MPA, affected employees were entitled to significantly greater benefits than required under then-prevailing railroad labor law.

Prior to the merger, the N.Y. Central owned 93% of the Cleveland Union Terminals Company ("CUT"), a passenger rail carrier subsidiary. Petitioners in this appeal were employed as yard workers at the CUT. On February 16, 1965, the N.Y. Central and the BRT negotiated an agreement in anticipation of the N.Y. Central's merger into the Penn Central. This so-called "Top and Bottom Agreement" granted CUT employees the right to work at a nearby N.Y. Central freight yard after the merger took effect. The agreement provided for the merger of the CUT employees' seniority roster into the existing N.Y. Central seniority roster. The CUT employees were to be placed at the bottom of the merged roster in the order of their seniority on the CUT, with a common seniority date of September 10, 1964, while the N.Y. Central employees retained their place on the roster in order of their dates of employment on the N.Y. Central. Inasmuch as all of the N.Y. Central employees were employed prior to September 10, 1964, all of the N.Y. Central employees ranked above the CUT employees on the merged seniority roster.

The two carriers finalized their merger on February 1, 1968. On February 21, 1968, Petitioners and other CUT employees were furloughed from their CUT jobs as part of a reduction in force on the CUT, effective February 25, 1968. The furlough notice told the CUT employees to "immediately contact" the N.Y. Central yardmaster for work in the freight

yard, pursuant to the Top and Bottom Agreement. Petitioners never reported for work at the N.Y. Central freight yard and were discharged without compensation after failing to respond to a final notice to report dated December 15, 1969.

At the time Petitioners were furloughed, the BRT and the Carrier were in a dispute as to whether the MPA applied to employees of subsidiary railroads, like the CUT. The Carrier's position was that the agreement applied only to employees of the two merging carriers, whereas the BRT argued that employees of subsidiaries were also covered under the agreement. The furloughed employees were fully aware of this dispute. The parties settled this dispute as to the CUT (but not as to other subsidiaries) by an agreement reached on July 11, 1969, under which the parties agreed that the MPA covered CUT employees.

The instant proceeding involves efforts by Petitioners to obtain labor protection benefits pursuant to the MPA. On September 15, 1969, seventeen claimants, all of whom were among the CUT employees furloughed in February 1968, brought suit in the United States District Court for the Northern District of Ohio alleging that the Carrier failed to provide benefits owing under the MPA. Ten of these claimants had reported to work at the N.Y. Central freight yard, whereas seven had not. By oral ruling issued on July 14, 1976, and a written decision issued on November 29, 1979, the district court ruled that all seventeen claimants were employees of the N.Y. Central and thus were covered by the labor protection provisions of the MPA. The district court further ordered the parties to submit to arbitration the question of whether the claimants had sufficiently complied with the MPA's requirements so as to warrant an award of benefits.

In 1992, an arbitration panel entered a decision finding all seventeen claimants ineligible for compensation under the MPA. The arbitration panel found that those claimants who

had reported for work at the N.Y. Central freight yard failed to process grievance claims adequately, admitted their ineligibility for benefits, or lost work due to causes that were deemed by the panel not to trigger benefit payments. The arbitration panel further found that those claimants who *had not* reported to work at the freight yard did not have a reasonable basis for not reporting, and thereby failed to comply with the MPA's requirement that employees exercise their seniority rights to obtain available work.

All seventeen claimants appealed the decision of the arbitration panel to the Surface Transportation Board (the "Board"). In a decision issued December 2, 1998, the Board reversed the arbitration panel's decision with respect to the ten claimants who had reported to work following the February 1968 furlough; however, the Board summarily affirmed the panel's decision as to the seven claimants who had failed to report to work at the freight yard. Those seven claimants who did not report to work now petition this Court to reverse the decision of the Board.[1]

II. DISCUSSION

A. Regulatory Framework

Railroads must obtain regulatory approval from the Board before consolidating or merging their properties. *See 49 U.S.C. § 5*(2) (1973), *revised and recodified at 49 U.S.C.A. § § 11323*-11326 (West Supp. 2000). As a condition for approval, the Board (previously, the Interstate Commerce Commission ("ICC"))[2] is required to protect the interests of affected railroad employees. *See id.* Specifically, the Board is required to impose conditions on any merger transaction such that employees are not placed in a worse position with respect to their employment for at least four years following the merger. *See id.*

To give effect to such protective conditions, applicant rail carriers must negotiate an implementing agreement with their employees' unions before making any changes in operations that might affect the carriers' employees. *See id.* If the carriers and the union cannot reach an agreement voluntarily, the matter is submitted to arbitration, and the arbitrator will resolve the matter and set specific terms for implementation. *See id.* An arbitral decision regarding labor protective conditions imposed by the Board may be appealed to the Board for review. *See 49 C.F.R. § 1115.8* (1999).

B. Standards of Review

1. The Board's standard of review

The Board must employ a deferential standard when reviewing the decision of an arbitration panel. The applicable standard, which was adopted by the ICC in the so-called "*Lace Curtain*" decision and subsequently codified in federal regulations governing the Board's review powers, limits the Board's review of arbitration decisions to "recurring or otherwise significant issues of general importance regarding the interpretation of [the Board's] labor protective conditions." *Chicago & Northwestern Transp. Co--Abandonment--Near Dubuque & Oelwein, IA, 3 I.C.C. 2d 729, 735-36 (1987) ("Lace Curtain"), aff'd sub nom. Int'l Bhd. Elec. Workers v. I.C.C., 274 U.S. App. D.C. 103, 862 F.2d 330 (D.C. Cir. 1988). See 49 C.F.R. § 1115.8.* The Board does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." *Lace Curtain, 3 I.C.C. 2d at 735-36.* "Egregious error" means "irrational," "wholly baseless and completely without reason," or "actually and indisputably without foundation in reason and fact." *See Am. Train Dispatchers Ass'n v. CSX Transp., Inc., 9 I.C.C. 2d 1127, 1130-31 (1993)* ("*ATDA*") (quoting *Loveless v. Eastern Airlines, Inc., 681 F.2d 1272, 1275-76 (11th Cir. 1982)).*

The ICC has elaborated on the *Lace Curtain* standard of review as follows:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or exceeds the authority reposed in arbitrators by those conditions.

Delaware & Hudson Ry. Co.--Lease and Trackage Rights Exemption--Springfield Terminal Ry. Co., Finance Docket No. 30965 (Sub-No. 1) *et al.* (ICC served Oct. 4, 1990) at 16-17, *remanded on other grounds in Ry. Labor Executives' Ass'n v. United States, 300 U.S. App. D.C. 142, 987 F.2d 806 (D.C. Cir. 1993).* Thus, the Board's review of an arbitration decision is limited to determining whether the award was procedurally fair and impartial. *See Atlantic Richfield & Co.--Control--Butte, Anaconda & Pacific R.R. & Tooele Valley R.R.*, Finance Docket No. 28490 (Sub-No. 1) (ICC served March 2, 1988). Only when the arbitrator has committed "egregious error" may the Board vacate the arbitration award for substantive mistake. *Id.*

2. The Court's standard of review

This Court reviews decisions of the Board pursuant to a similarly deferential standard. Under the Administrative Procedure Act (the "APA"), courts may not set aside a decision of the Board unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, or unsupported by substantial evidence. *See 5 U.S.C. § 706*(2)(A), (E); *Film Transit, Inc. v. I.C.C., 699 F.2d 298, 300 (6th Cir. 1983).* In determining whether the Board's decision was arbitrary or capricious, the court must consider whether the decision was based on a consideration of the relevant factors and whether there was a "rational connection

between the facts found and the choice made." *Film Transit, 699 F.2d at 300.* In determining whether the Board's findings are supported by substantial evidence, we must ask whether the Board considered "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion reached." *R.P. Carbone Constr. Co. v. Occupational Safety & Health Review Comm'n, 166 F.3d 815, 818 (6th Cir. 1999).* Substantial evidence is thus more than a mere scintilla of evidence, but less than a preponderance of the evidence. *See id.*

C. The Board Was Permitted To Affirm the Arbitration Panel's Decision Summarily

As a threshold matter, Petitioners argue that, because the Board summarily affirmed the arbitration ruling against Petitioners without supplying an independent explanation for its decision, the Board's ruling necessarily is arbitrary and capricious and must be reversed. Petitioners cite case precedent requiring the Board to provide a reasoned explanation for its decisions, such that a reviewing court has a basis for understanding the Board's action. *See, e.g., Burlington Truck Lines v. United States, 371 U.S. 156, 168, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962)* (agency "must disclose the basis for its order" and "give a clear indication that it has exercised the discretion with which Congress has empowered it"); *Mr. Sprout, Inc. v. United States, 8 F.3d 118, 129 (2d Cir. 1993)* (a "reviewing court must be able to understand the basis of the agency's action so that it may judge the consistency of that action with the agency's mandate").

It is true that the Board's decision did not independently address Petitioners' arguments but rather adopted by reference the reasoning of the arbitration panel. The Board was permitted, however, to affirm summarily the arbitrator's decision. *See City of Bethany v. F.E.R.C., 234 U.S. App. D.C. 32, 727 F.2d 1131, 1144 (D.C. Cir. 1984)* (holding that agency's summary affirmance of an administrative law

judge's detailed and thorough decision was proper and provided an opportunity for intelligent review by the court). The APA "does not require an agency to furnish detailed reasons for its decisions so long as its conclusions and underlying reasons may be discerned with confidence." *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth., 802 F.2d 843, 845 (6th Cir. 1986)* (citations and internal quotation marks omitted).

It is apparent that the Board was well aware of Petitioners' arguments when it affirmed the arbitration panel's decision. Indeed, the Board summarized the two principal arguments posed by Petitioners before affirming the panel's decision as it pertained to Petitioners. Inasmuch as the arbitration panel's decision fully addressed Petitioners' claims, we reject Petitioners' contention that the Board's failure to articulate an independent opinion for affirming the panel's decision constitutes reversible error under the APA.

D. The Board Properly Affirmed the Arbitration Panel's Ruling

Under the deferential standard of Board review set out in *Lace Curtain* and *49 C.F.R. § 1115.8*, the Board may reverse an arbitration panel's decision only if: (1) the ruling failed to conform to the labor protective conditions imposed by the Board; (2) the ruling exceeded the panel's authority; or (3) the panel committed egregious error. Petitioners have failed to establish any of these criteria for overturning the arbitration panel's decision.

First, the arbitration panel's decision conformed with the labor protective conditions imposed by the Board. The applicable labor protective conditions imposed by the ICC in this case required the Carrier to abide by the terms of the MPA. The arbitration panel's ruling -- that Petitioners' failure to report to work precluded their recovery under the MPA -- was based upon the express terms of the MPA. As the arbitration panel observed, section 1(b) of the MPA expressly

required covered employees to accept available work in order to qualify for benefits. As there was no exception to this requirement under the MPA, there was no basis for finding that the arbitration decision failed to "draw its essence" from the applicable labor agreements, as Petitioners suggest. *See Delaware & Hudson Ry. Co*, Sub-No. 1 at 16-17.

Petitioners argue that the arbitration decision was inconsistent with the law of the case as established by the district court's 1976 oral ruling. The district court's order, however, resolved only the question of the general entitlement of employees of subsidiary railroads to benefits under the MPA. The district court specifically reserved for arbitration the question of "whether or not there was . . . compliance by [Petitioners] with the terms of that agreement so as to entitle them to benefits." Thus, Petitioners' law-of-the-case argument fails.

Petitioners' argument that the arbitration panel exceeded its authority is also without merit. The panel's decision with respect to Petitioners fell squarely within the decision-making authority granted to it by the ICC and the MPA. *See 49 U.S.C. § 5*(2) (1973), *revised and recodified at 49 U.S.C.A. § § 11323*-11326 (West Supp. 2000). The fact that the arbitration panel may have unnecessarily prolonged the arbitration process by requiring Petitioners to prove their status as employees covered by the MPA, as Petitioners' argue, is not evidence that the panel exceeded its authority in rendering its decision. Indeed, the panel decided the precise issue expressly reserved for arbitration under the district court's 1976 and 1979 orders.

Finally, the panel did not commit egregious error in deciding the merits of Petitioners' claims. As the Board points out, there was ample factual basis for rejecting Petitioners' argument that they risked waiving their rights under the MPA if they reported to work at the N.Y. Central freight yard. Moreover, the panel properly rejected

Petitioners' argument that the carrier anticipatorily breached its contractual obligations under the MPA. The panel reasonably found that Petitioners' refusal to report to work was at their own peril, particularly in light of the numerous notices sent to Petitioners to report to work and the numerous warnings to Petitioners that they would forfeit their benefits if they failed to report. Furthermore, the panel was justified by ample record evidence in rejecting Petitioners' argument that the work at the N.Y. Central freight yard was not comparable to their previous work at the CUT.

There being no showing that the Board's determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, or unsupported by substantial evidence, *see 5 U.S.C. § 706*(2)(A), (E), this Court "is not empowered to substitute its judgment for that of the agency." *Simms v. National Highway Traffic Safety Admin., 45 F.3d 999 at 1003.* Under the deferential *Lace Curtain* standard, we therefore find that the Board properly affirmed the arbitration panel's decision with respect to Petitioners.

III. CONCLUSION

Accordingly, we **AFFIRM** the Board's decision.

----------Footnotes----------

[1] Penn Central filed a petition for judicial review of the Board's decision as it related to the ten claimants who had reported to work. The Board moved to dismiss Penn Central's petition on the ground that the Board's decision was not a final order, and, therefore, not ripe for review. Penn Central then filed a petition to voluntarily dismiss the case, which this Court granted. Consequently, only that portion of the Board's decision addressing the seven claimants who refused to report to work is at issue in this appeal.

[2] Pursuant to the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (1995), the Surface Transportation

Board is the successor agency to the ICC with respect to the issues presented in this case. Consequently, we use the terms "ICC" and "Board" interchangeably.

STB Finance Docket No. 21989 (Sub-No. 3)

SURFACE TRANSPORTATION BOARD

PENNSYLVANIA RAILROAD COMPANY--MERGER--
NEW YORK CENTRAL RAILROAD COMPANY
(ARBITRATION REVIEW)

SERVICE DATE: December 8,
1998

December 2, 1998

OPINIONBY:
MORGAN; OWEN

OPINION:

DECISION

We are partially granting the appeal brought by 17 former employees of the Cleveland Union Terminals Company of the decision of an arbitration panel (Fred Blackwell, Chairman and neutral member) (hereafter, the Decision) denying these employees' claim for benefits under an agreement entered into on January 1, 1964, for the protection of railroad employees who would be affected by the 1968 merger of the Pennsylvania Railroad Company and the New York Central Railroad Company to form the Penn Central Transportation Company.

BACKGROUND

In 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company (N.Y. Central) agreed to a merger that resulted in the formation of the Penn Central Transportation Company (Penn Central). In the 1970s, the

Penn Central went bankrupt, and the great bulk of its assets were transferred in 1976 to a new carrier, Consolidated Rail Corporation (Conrail). The estate of the Penn Central continued to survive in possession of real estate holdings and lines that were not transferred to Conrail. When the appeal in this docket was filed, the surviving company of the estate of the Penn Central was called the "Penn Central Corporation," the respondent in this proceeding. We refer to the respondent Penn Central Corporation as "the carrier" because its predecessor was a rail carrier subject to our jurisdiction when this controversy first arose.

On May 20, 1964, the Brotherhood of Railway Trainmen (BRT) and the two merging carriers entered into an agreement for the protection of employees (the 1964 merger protection agreement).[1] The 1964 merger protection agreement provided considerably more than the standard levels of protection that applied under our New York Dock and pre-New York Dock formulas.[2] This agreement was signed by the two carriers alone and did not directly refer to any subsidiary carriers.

Before the merger, the N.Y. Central owned 93% of a passenger carrier subsidiary, the Cleveland Union Terminals Company (CUT). The 17 claimant petitioners in this proceeding (claimants) were all yard workers on the CUT. On February 16, 1965, the N.Y. Central and the BRT negotiated an agreement to allow CUT employees an opportunity to work at a nearby N.Y. Central freight yard by merging the CUT seniority roster with the pre-merger seniority roster for N.Y. Central employees who worked at the freight yard. The rosters were merged by placing the former CUT employees at the bottom of the merged roster in the order of their seniority on the CUT, with a common seniority date of September 10, 1964. The N.Y. Central employees who were already working at the freight yard were placed on the roster in order of their dates of

employment on the N.Y. Central. All of those dates predated September 10, 1964.

The merger was finalized on February 1, 1968. On February 21, 1968, the claimants and other CUT employees, except for some CUT employees who were retained in the CUT workforce, were furloughed from their CUT jobs effective on February 25, 1968. The furlough notice told the furloughed CUT employees to "immediately contact" the freight yardmaster to "stand for" work in the freight yard under the February 16, 1965 agreement merging the rosters.[3] As explained below, we must distinguish between those of the 17 petitioning claimants who accepted the carrier's invitation to stand for work in the freight yard[4] and those who did not.[5]

When the claimants were furloughed, the BRT and the merging carriers were disputing whether the 1964 merger protection agreement applied to employees of subsidiary railroads like the CUT. The carrier's position was that the agreement applied only to employees of the N.Y. Central and the Pennsylvania Railroad Company. The furloughed employees were fully aware of this dispute. The parties settled this dispute as to the CUT (but not as to other subsidiaries) by an agreement reached on July 11, 1969, under which the parties agreed to apply the 1964 merger protection agreement to CUT employees.[6]

This proceeding involves the efforts of claimants to obtain labor protection benefits pursuant to the 1964 merger protection agreement. While the carrier now agrees that the 1964 merger protection agreement applies to former CUT employees, the carrier has consistently denied that claimants have individually satisfied the conditions established in that agreement for claiming and receiving benefits. On September 15, 1969, the claimants filed suit in a U.S. District Court, alleging two causes of action: (1) failure by the carrier to

provide benefits claimed under the 1964 merger protection agreement; and (2) failure by the BRT to provide adequate representation of their interests. By oral ruling issued on July 14, 1976, and a written decision issued on November 29, 1979, the court dismissed the complaint as to inadequate representation and ordered that the remaining issue of claimants' entitlement to benefits under the merger protection agreement be resolved by arbitration.

In compliance with the court's arbitration order, the parties entered into an arbitration agreement on June 18, 1980. An initial arbitration panel met in 1983 but was subsequently disbanded. The current arbitration panel was convened in 1988. The panel held a 3-day oral evidentiary hearing in May 1990.

On June 22, 1992, the panel entered its Decision, which was followed by issuance of a supplemental Decision on July 16, 1994, and a dissenting opinion on August 25, 1994. The panel denied all of the claims for benefits, finding that: (1) those claimants who refused to report for work at the freight yard did not have a reasonable basis for their refusal and thereby failed to comply with requirements in the 1964 agreement that employees exercise their seniority rights to obtain available work; and (2) the claimants who reported for work failed to process grievance claims adequately, admitted their ineligibility for benefits, or lost work due to causes that were deemed by the panel not to trigger benefit payments, such as declining business, physical incapacity, or voluntarily quitting work.

On November 16, 1994, claimants filed an appeal of the panel's Decision with the ICC,[7] which docketed the appeal as Finance Docket No. 21989 (Sub-No. 2). By decision served on August 1, 1996, in the (Sub-No. 2) proceeding, the Board denied the appeal, finding that claimants' cursory appeal failed to define any issues for, or provide any evidence in

support of, review. An appeal of this decision to the Court of Appeals for the 6th Circuit was dismissed by the court based on a stipulation that the Board would re-docket the appeal if claimants filed documents in support of it.

On April 17, 1997, claimants re-filed their appeal with supporting documentation, and the appeal was re-docketed as the instant (Sub-No. 3) proceeding.[8]

The carrier filed a reply in opposition to the appeal on June 24, 1997.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.8, the standard for review of labor arbitration appeals is provided in *Chicago & North Western Transp. Co.--Abandonment, 3 I.C.C.2d 729 (1987)*, aff'd sub nom., *International Brotherhood of Electrical Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988)*, popularly known as the "Lace Curtain" case. Under the Lace Curtain standard, the Board does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." *Id. at 735-36.* In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in *Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993)*, the Interstate Commerce Commission (ICC) elaborated on the Lace Curtain standard, as follows:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed

in arbitrators by those conditions. [Citations omitted.]

We will partially grant the appeal under our Lace Curtain standard. We find that the panel erred egregiously and failed to observe the imposed labor protection conditions in summarily denying benefits to the claimants who reported for work at the freight yard. We uphold the panel's denial of benefits to the claimants who did not report for work. We will remand the panel's Decision to the parties for action in conformity with this decision.

I. Claimants Who Reported For Work

The parties agreed on a bifurcation of the arbitration process, whereby claimants' basic eligibility for compensation would be explored in Phase I, and thereafter, if they were found eligible, the precise amount of compensation would be determined in a subsequent Phase II. Tr. 134-135. The panel denied all benefits for the 10 former CUT employees who reported for work at the freight yard, refusing to proceed to Phase II on the grounds that the claimants failed to establish their basic eligibility for compensation. The panel found that the claimants who reported for work did not process and establish their grievance claims adequately, in that they failed to pursue arbitration when benefits were not awarded, failed to turn in wage guarantee forms, and failed to show that their wages in their new positions were less than the amounts guaranteed under the protective benefits. The panel also held that employees were required to show that their losses were "as a result of the merger" (hereafter, the "causation requirement") and that this condition was not met, at least for a key witness, Christ Steimle, who "mentioned" loss of jobs due to declining business and a physical incapacity.[9] The panel also found that at least the key witness Christ Steimle "held the belief at the time that he was not entitled to wage guarantee payments and that the belief had a

sound fact basis."[10] As explained below, these findings reflect egregious error and failure to observe the imposed labor protection conditions.

A. Failure to Pursue Arbitration

A review of the history of this proceeding shows that the panel erred egregiously in finding that the claimants who reported for work should be denied all relief because they did not pursue arbitration in a timely manner. As noted, the claimants, instead of proceeding immediately to arbitration of their claims for benefits, brought suit in a federal district court for the benefits and joined an additional claim alleging failure by the BRT to provide adequate representation of their interests. We cannot fault claimants for going to court before they agreed to arbitration, because, as indicated in the court's decision directing arbitration of the claim for benefits, it was not clear at the time that individual employees, as distinguished from their unions, could invoke arbitration.[11]

In any event, the arbitration that was actually before the panel was the only arbitration that claimants needed to pursue in this matter. The court ordered that the issue of claimants' eligibility for benefits be submitted to arbitration. The parties responded by entering into an arbitration agreement. Because the court's order was never appealed and remains in effect today, it is the law of the case, and it may not be collaterally attacked with the argument that claimants' request for benefits must be denied because claimants did not seek arbitration first but rather began their quest for benefits in court. The panel erred in citing failure to arbitrate as a reason for dismissal when the required arbitration was actually before the panel.

B. Wage Guarantee (Claim) Forms

In denying the claims, the panel relied on the fact that lead witness Steimle, who testified that he was the only living claimant who reported for work (Tr. 471), ceased to file claim forms. The panel used this to support its finding that he and the other claimants who reported believed at the time that they were not entitled to benefits.

We disagree with the panel's approach. The fact that witness Steimle and other claimants ceased to file claim forms does not by itself show that they believed at the time that they were not entitled to benefits. Mr. Steimle testified that he and his "fellow employees" sent claim forms to the payroll department and "received no response whatsoever." Tr. 521. A lack of response by the carrier would not be surprising, because claimants were in litigation with the carrier over the provision of benefits. Witness Steimle further testified that his supervisor "thought it was a joke" that he would even bother to apply for protective benefits because he was not going to get benefits anyway. Tr. 522-523. The panel ignored evidence that claimants ceased to file claim forms because of lack of response from the carrier and because of negative feedback from supervisors, rather than because they believed that they were not entitled to benefits.

The panel might have been able to infer that the claimants doubted their eligibility for benefits if they had totally neglected to file claims forms, but the record reveals no such neglect. As discussed above, witness Steimle testified that claimants filed the claims forms and ceased doing so only after receiving no response. Former Assistant Supervisor of Labor Relations George Ellert, the only witness called by the carrier, admitted on cross examination that he did not know whether any of the claimants filed forms (Tr. 647) and in any event would have been aware only of any appeals that may have been filed (Tr. 563-564).

We can draw no inference from the panel's observation (Decision at 14) that claimants (specifically referring to witness Steimle) did not retain copies of their claims forms. The carrier arguably was the proper repository of the forms because only the carrier could take the information on them and compare it with the base ("test period") earnings information in its possession so as to compute any compensation that may have been owed.[12] Because the carrier was litigating the issue of compensation, it was on notice to keep records of what forms were or were not submitted. Claimants had no duty to administer the compensation scheme and to act as record keepers for that purpose. Moreover, the wage and hour information on the claims forms was relevant only to the subsequent, damages (Phase II) hearing that was never held because the prior, liability (Phase I) hearing resulted in a finding that the employees were not eligible for benefits.

C. The Issue of Causation

The panel found that the claimants who reported to the yard failed to show that their losses were as a result of the merger. This finding will be vacated. The record shows that the claimants who reported for work suffered losses as a result of the merger and provides no reason to find that claimants' losses were due to other causes that would excuse the carrier from paying benefits. Before the merger and furloughs took place, claimants were fully employed at the CUT passenger yard with many years of seniority.[13] Immediately after the merger, claimants were asked to "stand for" work at a nearby freight yard where no work was available for them for many years because they were placed at the bottom of a new seniority list that was created as a result of the merger.[14] The jobs for which the claimants were expected to "stand" were not actual jobs.[15] The claimants experienced a drop in income immediately after they reported for work at the freight yard and their drop in income was not

due to sickness, discipline, or failure to exercise seniority rights.[16] The panel failed even to mention the voluminous evidence submitted by complainants to show injury. It is not clear what else claimants could have submitted to satisfy the panel that they suffered losses as a result of the merger.

The panel's Decision is especially questionable because the carrier produced no evidence at all that any of the conditions specified for refusing benefits in the 1964 merger protection agreement were satisfied for the 10 claimants who reported to the freight yard. The carrier (reply at 13) defends the panel's Decision on the grounds that the "testimony presented at the hearing" shows that the claimants "had lost work due to declining business." Our examination of the hearing record, however, shows that the carrier made no effort whatsoever to identify specific periods of general business decline, emergency conditions, or other supervening events that would justify nonpayment of benefits under section 1(b) of the agreement. The fact that claimants' losses began to be experienced shortly after the merger and furlough makes it unlikely that supervening causes could explain claimants' losses. Nor did the carrier come forward with evidence showing that any claimants were disabled or disciplined in accordance with that provision.

Under the circumstances presented on the record before us, we find that the panel committed egregious error by finding that none of the claimants who reported for work were entitled to any compensation. Unless an arbitral panel can point to evidence supporting total denial that we have overlooked and that is considerably more compelling than the evidence cited in its 1992 Decision, summary denial of all benefits is completely unjustified. Some of the reasons cited by the panel here for totally denying compensation, such as the fact that claimants may have found work elsewhere or suffered illness, will be relevant to any determination of the amount of compensation for individual claimants, but these

reasons do not justify the denial of all compensation for all of the claimants.

II. Claimants Who Did Not Report For Work

The panel denied the claims of the 7 claimants who never reported for work at the freight yard. The panel ruled that those claimants contravened the 1964 merger protection agreement by failing to exercise their seniority rights to work at the freight yard. The panel rejected two defenses raised by those claimants for their failure to report, i.e., that: (1) the work offered at the freight yard was not comparable work; and (2) a doctrine of "anticipatory breach" excused them from reporting to work on the theory that the carrier was simultaneously breaching its duty to provide protective benefits. We affirm the panel's Decision as it pertains to the 7 claimants who do not report for work at the freight yard.

III. Conduct Of Future Proceedings

For the reasons explained above, we are vacating the panel's denial of damages for the 10 claimants who reported to work at the freight yard after the furlough. In accordance with standard practice, we will not affirmatively find that claimants are entitled to compensation but will remand the issue of the entitlement to compensation to the parties, who may attempt to resolve the issue among themselves or seek additional arbitration on this issue consistent with this decision.

The current record is not, and was not intended to be,[17] adequate for the computation of the compensation to be received by each individual claimant. For each individual claimant, the parties, or an arbitration panel if the parties cannot agree, will have to gather facts that are relevant to determining the amount of compensation under the 1964 merger protection agreement, in areas such as the following:

(1) test period earnings and benefits with the carrier; (2) actual earnings with the carrier; (2) replacement income earned with other employers; (3) periods of disability; (4) dismissal for cause; and (5) whether there was a general or seasonal business decline that could excuse compensation under section 1(b) of the 1964 merger protection agreement.

We recognize that the task may be a difficult one for the parties as the issues were pending for about 28 years before our jurisdiction was properly invoked in 1997. Because so much time has passed, we would prefer to be in a position to have rendered a decision that provided final resolution or greater certainty for the parties. Having found that the panel's Decision summarily denying all claims was fundamentally unfair to the claimants who reported for work at the freight yard, however, we find it necessary to remand the matter for the unfairness to be corrected. Despite the difficulties they will face, the parties are in the best position to accomplish that. We urge them to work together to reach a just and speedy resolution of all remaining issues.

This decision will not affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Claimants' request for oral argument is denied.

2. The Decision of the panel is vacated as it pertains to the 10 claimants who reported for work, and the proceeding is remanded to the parties for further action consistent with our findings.

3. This decision is effective on its date of service.

4. A copy of this decision will be served on the neutral member of the panel, at the following address:

Fred Blackwell, Esq.
19129 Roman Way
Gaithersburg, MD 20879

By the Board Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

FOOTNOTES

[1] This agreement was modified on November 16, 1964, on December 21, 1966, and on November 16, 1967.

[2] To meet its obligation to provide employee protection under former *49 U.S.C. 11347,* which has been recodified as current *49 U.S.C. 11326,* our predecessor agency, the Interstate Commerce Commission (ICC) adopted the benefit formula and procedure set forth in *New York Dock--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).*

[3] The CUT was not merged into the Penn Central until July 11, 1969, but the prior furlough and reporting notices show that workforce coordination began before the CUT was formally folded into the Penn Central.

[4] The 10 former CUT employees who reported to the freight yard were Messrs. Acree, Benko, Day, Doran, Gastony, Gentile, Norris, Steimle, Tomczak, and Uher.

[5] The 7 former CUT employees who did not report to the freight yard were Messrs. Augustus, Beedlow, Grady, Knopik, McLaughlin, Potosky, and Tannenbaum. These persons were discharged without compensation after failing to respond to a final notice to report dated December 15, 1969.

[6] The ICC subsequently held that the benefits of the 1965 merger protection agreement applied ab initio to employees of all subsidiary railroads. *Pennsylvania R. Co.--Merger--New York Central R. Co., 347 I.C.C. 536, 548 (1974).* Moreover, in a July 14, 1976 oral ruling (reproduced in Exh. 54), a court found that both parties had agreed that the former CUT employees were N.Y. Central employees for the purpose of determining their eligibility for protective benefits under the 1964 merger protective agreement. (Note: The exhibit numbers used in this decision refer to the numbers assigned to the exhibits submitted by the claimants in this arbitration appeal.)

[7] The court previously refused to hear the appeal, finding that jurisdiction lay with the ICC. The court's order is attached as Exhibit D to the carrier's reply.

[8] In their appeal filed on April 17, 1997, claimants request oral argument. We will deny the request for oral argument. We are capable of resolving the legal issues without oral argument as no issues have been presented that cannot be decided based on the written record.

[9] Decision, at 14. The panel was unclear as to whether benefits were being denied only for Mr. Steimle due to his failure to fulfill the alleged causation requirement, or whether failure to fulfill the alleged requirement was grounds for denying benefits for all of the claimants who reported for work.

[10] Decision, at 15. The panel was unclear as to whether it was finding that (a) only Mr. Steimle had this belief or (b) this belief was held by all of the claimants who reported for work.

[11] Indeed, the order of the United States District Court for the Northern District of Ohio, Eastern Division, dated November 24, 1979, reproduced at Exhibit 55 submitted to the arbitration panel, noted at page 3 that section 1(e) of the 1964 merger protection provided only that arbitration was to be invoked by a "labor organization signatory to this Agreement." Thus, the plain language of the agreement

arguably seemed to preclude individual employees from seeking recourse to arbitration. Without citing precedent, the court criticized this restriction as "overly technical" and held that the arbitration provision applied to individual workers as well as to their union.

[12] On cross examination, carrier witness George Ellert stated that test period pay data were kept by the carrier. Tr. 627.

[13] If the claimants had been on furlough from their prior job at the CUT passenger terminal, the carrier might have been able to argue that their lack of work was pre-existing and thus not due to the furlough, but this was not the case. Moreover, we will not speculate as to whether claimants would have kept their jobs at the CUT passenger yard if the merger had never taken place, as no evidence was introduced on this topic. Moreover, we note that Amtrak was not created until the early 1970s.

[14] The pre-merger CUT seniority roster had 63 men on it. Exh. 2. About 50 of those men transferred to the new, merged seniority roster. Exh. 66. Because there were 509 persons on the merged seniority roster, including the former CUT employees (Exh. 3), work had to be found for many former N.Y. Central employees before it could be offered to the former CUT employees. While the July 11, 1969 agreement allocated 2.46% of the total yard force to former CUT employees, this guaranteed work for only about 9 former CUT employees, none of whom included claimants. See the testimony of witness Beedlow at Tr. 243, whose testimony in this respect was not disputed by the carrier. Claimant Christ Steimle stated that he did not have enough new list seniority to obtain a job until 1984 (Exh. 66) or 1985 (Tr. 512). As Mr. Steimle was the senior man of the CUT claimants (Tr. 643-644), it is clear that if he lacked enough seniority to obtain work, the other claimants did also.

[15] George Ellert, a former superintendent at the freight yard, initially testified that jobs were available for those who reported for work (Tr. 149), but on cross examination he

admitted that claimants were not called back to regular, full-time positions but were instead assigned to an "extra board" or an "extra list," whose members were not guaranteed a specific number of hours of work (Tr. 154-157). At Tr. 258, witness Beedlow testified that claimants were called back to "nonexistent jobs." The carrier did not respond with evidence to the contrary, such as, for example, a list of the claimants who readily found work at the freight terminal.

[16] Concerning the 10 men who reported for work at the yard, witness Beedlow testified generally as to the inability of all claimants to find work after they reported. Tr. 256. More specific evidence as to drop in income was submitted for the following 7 of the 10 claimants who reported to the yard:

Acree. Affidavit from wife. Exh. 62.

Benko. Testimony based on comparison of W-2 forms before and after the furlough. Tr. 170-172. Corroborated by witness Beedlow at Tr. 254.

Day. Testimony based on comparison of W-2 forms before and after the furlough. Tr. 162-170. Corroborated by witness Beedlow at Tr. 252.

Norris. In a letter dated February 18, 1972 (Exh. 51), he wrote that he was "only working several days a month."

Steimle. Testified that he never had regular employment after he reported to the freight yard. Corroborating affidavit from wife. Exh. 66.

Tomczak. Testimony based on comparison of W-2 forms before and after the furlough. Tr. 176-178. Affidavit from widow. Exh. 67.

Uher. Affidavit from widow. Exh. 68.

[17] As discussed above, the parties agreed on a bifurcated arbitration procedure.

A MATTER BEFORE THE ARBITRATION COMMITTEE
ESTABLISHED UNDER SECTION 1 (e) OF THE
MERGER PROTECTION AGREEMENT OF
NOVEMBER 16, 1964

MICHAEL J. KNOPIK, ET AL.,
CLAIMANTS

v.

PENN CENTRAL TRANSPORTATION
COMPANY (CARRIER)

Claims For Benefits Under The MPA of January 1, 1964

Claims Denied

June 22, 1992

Members of Arbitration Committee

Fred Blackwell, Esq. - Chairman/Neutral
Wallace R. Steffen, Esq. - Claimants' Member
Jeffrey H. Burton, Esq. - Carrier Member

APPEARANCES

For the Claim

Carla Tricarichi, Esq.
Tricarichi & Carnes
55 Public Square
Illuminating Building
Suite 2120
Cleveland, Ohio 44113

For the Carrier

Thomas Skulina, Esq.
Ohio Savings Plaza
1801 East 9th Street
Suite 709
Cleveland, Ohio 44114

ISSUE PRESENTED:

Are the Claimants entitled to the benefits of the MergerProtection Agreement of 1964? (Attachment "A" of Agreement For Arbitration dated June 18, 1980.)

"Claimants:

Michael J. Knopik, Clarence C. Tomczak, William E. Grady, George R. Norris, Sam Tannenbaum, Michael J. McLaughlin, Frank C. Uher, Kenneth B. Day, Antonio Augustus, Harvey E. Doran, Walter V. Potosky, George A. Gentile, Raymond Beedlow, Jack F. Acree, Edward Benko, Christ Steimle, Jr., Joseph D. Gastony."

DECISION:

The claims of the Claimants, who returned to work on or after February 25, 1968 pursuant to work offered in furlough not ice dated February 21, 1968 and/or pursuant to work offered in 1969 recall notices, are denied on the ground that the record evidence does not establish that these Claimants were "adversely affected" by the merger, within the meaning of that term in Section 1 (a) of the MPA.

The claims of the Claimants, who did not return to work on or after February 25, 1968 pursuant to carrier's offer of available work in furlough notice dated February 21, 1968 and/or pursuant to Carrier's offer of available work in recall notices issued to Claimants in and after May 2, 1969, are denied on the ground that the refusal of these Claimants to accept said available work did not have a reasonable, basis and was not for an excusable reason and that said refusal thus constituted a failure to comply with the Section 1 (b)

provision in the MPA that requires covered Employees to accept available work in order to qualify for benefits: hence, said refusal of work resulted in the Claimants becoming ineligible for MPA benefits.

OPINION

I. NATURE OF CASE; HEARINGS AND JURISDICTION

This case arises from the claims of seventeen (17) claimants who seek payment from the Penn Central Transportation Company (the Carrier) for benefits under the Merger Protection Agreement (MPA), effective January 1, 1964, entered into by the Pennsylvania and New York Central Railroads in anticipation of a merger of those two (2) railroads (CX 1/ MPA).[1]

By Agreement For Arbitration dated June 18, 1980, the parties established the herein Arbitration Committee under Section 1 (e) of the Merger Protection Agreement of January 1, 1964, and framed the issue referred to in the statement of "Issue Presented."

A pre-hearing conference was held at the Sheraton Air port Hotel, Cleveland, Ohio on August 23, 1988. An Executive Session was conducted at the Sheraton Hopkins Airport Hotel, Cleveland, Ohio, on October 27, 1989.

Pre-hearing briefs Were submitted by the Claimants and the Carrier on April 20, 1990.

Hearings on the issue framed by the parties' Arbitration Agreement were held at Stouffer's Tower City Centre, Public Square, Cleveland, Ohio, on May 3, 4, and 5, 1990, at which both parties presented testimony and documentary evidence on the case.

CLAIMANTS' WITNESSES:
Raymond Beedlow Former New York Central Railroad Employee

Christ Steimle Former New York Central Railroad Employee

CARRIER WITNESS:
George Ellert Former Assistant Manager of Labor Relations Cleveland, Ohio

The transcript of the hearing on the matter was received in the office of the undersigned Arbitrator on June 14, 1990; the parties' post-hearing briefs were received on or before August 1, 1990, whereupon the evidentiary and briefing record on the matter was closed.

An executive discussion of the case was conducted by the Arbitration Committee in Washington, D. C. on November 17, 1990. Accordingly, the matter is properly before this Committee for determination on the hearing record and the briefs and arguments thereon

II. STATEMENT OF FACTS

The Claimants were formerly employed in passenger yard service by the Cleveland Union Terminal's Company (CUT), a subsidiary of the New York central Railroad. The Claimants seniority Was established on various dates between July 10, 1944 and August 2, 1951.

The NPA, under which the subject claims are made, was made effective January 1, 1965.

By virtue of the February 16, 1965 Agreement (the "Top & Bottom" Agreement), the CUT Employees, including

these claimants, acquired seniority rights on the Cleveland Freight Yard Roster. The parties to this Agreement were the NYC, Western District, the CUT, and the Yard Service Employees of both Carriers represented by the BRT. The Agreement gave the claimants a common seniority date of September 10, 1964 for bidding on the newly acquired rights to bid on jobs in the Cleveland Freight Yard.

On February 1, 1968 the Pennsylvania and the New York Central Railroads were merged to form the Penn Central Transportation Company (Carrier). CUT was merged into the Carrier on July 11, 1969.

On February 21, 1968, the Claimants were furloughed from their CUT jobs effective February 25, 1968.2 The furlough notice stated that the Claimants stood for work in Cleveland Freight Yard Territory (CX 30). Work in the Freight Yard was offered again in recall notices sent to the Claimants in 1969, beginning on May 2, 1969.

Some Claimants returned to work, and some did not, in response to the work offer in the February 21, 1968 furlough not ice and the work offers made in the recall notices sent in 1969 to the Claimants who did not return to work.

Between February 21, 1969 and December 1969, ten (10) Claimants returned to work in response to the Carrier's offers of work and seven (7) did not.[3] The ten Claimants who returned to work were Messrs.: Tomczak, Norris, Uher, Day, Gentile, Acree, Steimle, Benko, Gastony, and Damn. The seven Claimants who did not return to work were Messrs.: Augustus, Beedlow, Grady, Knopik, McLaughlin, Potosky, and Tannenbaum. (JX 1A & CX 10).

In and prior to 1969 there; was a dispute between the BRT and the Carrier about the coverage of CUT Employees

under the January 1, 1964 UPA. The Carrier's position was that CUP Employees were not covered by the MPA. The position of the BRT Was that the CUT Employees should be covered by the MPA.

This dispute was settled by a July 11, 1969 Agreement which provided for the coordination of the yard operations at Cleveland Union Terminal's Company with those of Penn Central in the Cleveland, Ohio Terminal, and which made CUT Employees subject to MPA benefits effective August 1, 1969. The provision on the rights of CUT Employees to MPA benefits is found in paragraph 7 of the July 11, 1969 Agreement, reading as follows:

> "7. In consideration of the factual situation present in this case and without prejudice to the position of any of the parties in any other case of a like or similar nature it is understood and agreed that Cleveland union Terminals Company yard service employees affected by this merger of the Cleveland Terminal will, effective on the date this agreement is consummated, be come subject to all the terms and conditions of the Merger Protective Agreement between the former New York Central, the former Pennsylvania and the former Brother hood of Railroad Trainmen. It is further understood that the Cleveland Union Terminals Company and former New York central Railroad earnings during the test period established by Appendix of the Merger Protective Agreement will be combined for the purpose of computing the earnings guarantees for Cleveland Union Terminal employees who are entitled to such guarantees under the provisions of this agreement subject to the qualifying conditions of the November 16, 1964 Merger Protective Agreement and appendices thereto."

Notwithstanding the execution of the July 11, 1969 agreement, the Claimants did not accept this agreement as re solving their problem concerning MPA benefits[4] and the Claimants decided to pursue their claims in Court. Consequently, on September 15, 1969, the Claimants filed a civil action in the U. S. District Court for the Northern District of Ohio, Eastern Division, against the Carrier and the United Transportation Union, successor of the BRT, alleging, inter alia, improper denial of MPA benefits by the Carrier.

The Court, Hon. Thomas D. Lambros presiding, ruled that the herein claims against the Carrier for MPA benefits should be arbitrated under the arbitration provisions of the MPA and in connection therewith, the Court, in oral rulings made on July 14, 1976, made the following findings (CX 54):

> "...the plaintiffs are employees of the New York Central Railroad as that term is defined in the merger protection agreement, and as that term applies to the job protection agreement and their job guarantee entitlement under the merger agreement." (p. 14)
>
> "...the plaintiffs were entitled to the full benefits of the job protection agreement, based on their combined wages of C.U.T. and their New York Central work, and were entitled to this, not only as of 1969, but at all applicable times prior thereto." (P. 15)
>
> "...the railroad's position is that these people, after they were furloughed from the C.U.T. roster, because of the unavailability of work, were then able to exercise the benefits which they had acquired, and their exclusive bidding rights that they had acquired...
>
> The railroad's position is that there was work available and that they did not avail themselves of that work, and thus the railroad's position is that

pursuant to the job protection agreement, that they lost and Waived and rendered themselves ineligible for job guarantee benefits in view of the fact that they did not accept work that was available to them.

I am mindful, however, that the plaintiff's position is that because of the representations made by the railroad, and because the status of the *parties* with respect to their entitlement of job guarantees was not clarified, that to the extent that they did not report for work or take that work, that should not deprive them of the benefits of job guarantee for if they had taken that work, that they could have conceivably prejudiced themselves and their contract was not in breach of a merger protection agreement by not reporting to work or marking **up."** (P. 23 and 24)

By order issued over date of November 29, 1979, Judge Laxubros referred the herein claims to arbitration pursuant to Section 1 (a) of the 1964 MPA (JX 1B; CX *55).* In compliance with that order the parties signed an Agreement For Arbitration dated June 18, 1980, which established the herein Arbitration Committee to hear and determine said claims (JX 1C)

III. POSITION OF THE CLAIMANTS

The position of the *Claimants* is that the claims should be sustained on the fol ing grounds (Claimant's Post-hearing Brief, pages 3 & 4)

"1. The claimants reasonably believed they were New York Central employees;

2. The carrier wrongfully asserted that the claimants were not NYC employees covered

by the Merger Protection Agreement;

3. The claimants made a good faith effort to resolve the question of their employment status before, at the time of and since the furlough on an ongoing basis.

4. Those claimants who did not report to the freight yards had a reasonable basis for their decision;

5. Those claimants who did report to the freight yards complied with all applicable agreements;

6. Those claimants who did *report* to the freight yards were only able to obtain sporadic employment, despite their desire to work full time;

7. The carrier wrongfully discharged those claimants who did not report to the freight yards;

8. The claimants earned less then what their Merger Protection Agreement benefits would have provided;

9. The carrier has wrongfully refused to provide MPA benefits to the claimants."

IV. POSITION OF THE CARRIER

The position of the Carrier is that the claims of the Claimants who returned to work should be denied on the grounds that the record evidence does not establish that these

Claimants were "adversely affected" by the merger; or that the evidence does not establish that they earned less than their guarantees; or that they did not file claims for guarantees and exhaust the remedies available to then under the MPA.

The Carrier submits further that the claims of the Claimants who did not return to work should be denied on the ground that the failure of these Claimants to return to work constituted a refusal of available work without a reasonable basis or excusable reason and that in consequence, these Claimants failed to comply with the provision in section 1 (b) of the NPA that conditions an Employee's right to collect payment for MPA benefits on the Employee's acceptance of work available to him in the exercise of his seniority in accordance with existing rules or agreements.

V. FINDINGS AND DISCUSION

The preponderating evidence of record does not establish the merit and validity of the claims and accordingly, the claims must be denied.[5]

The grounds of the denial of the claims are now indicated.

The claims of the Claimants, who returned to work on or after February 26, 1968 pursuant to work offered in furlough not ice dated February 21, 1968 and/Or pursuant to work offered in 1969 recall notices, are denied on the ground that the record evidence does not establish that these claimants were "adversely affected" by the merger, within the meaning of that term in section 1 (a) of the MPA.

The claims of the claimants, who did not return to work on or after February 25, 1968 pursuant to Carrier's

offer of available work in furlough notice dated February 21, 1968 and/or pursuant to Carrier's offer of available work in recall notices issued to Claimants in and after May 2, 1969, are denied on the ground that the refusal of these Claimants to accept said avail able work did not have reasonable basis and was not for an excusable reason and that said refusal thus constituted a failure to comply with the section 1 (b) provision in the MPA that requires covered Employees to accept available work in order to qualify for benefits; hence, said refusal of work resulted in the Claimants becoming ineligible for NPA benefits.

* * * * * * * * * * *

A. The Claimants Who Returned To Work

Although all specifics of the arguments made in behalf of the Claimants who returned to work have been considered,[6] it is deemed unnecessary to treat these arguments individually as these claims will be denied because the claimants have not demonstrated that their circumstances fulfilled the condition of being "adversely affected" by the consummation of the merger, which is a condition precedent that these claimants must meet in order to qualify for MPA benefits.

The MPA text on which this finding is based is found in Section 1 (a) of the MPA reading as follows (CX 1):

> "(a) . . the provisions of' the Washington Job Protection Agreement of 1936...shall be applied for the pro-protection of all employes of Pennsylvania and Central as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated <u>who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto incident to approval and</u>

effectuation of said merger;"
(underline added).

The phrase "adversely affected" means that in order to establish his right to payment of benefits under the MPA, an Employee must establish that he lost his employment or that he earned less than his MPA guarantee as a result of the' merger.[7] The fact asserted in claiming MPA benefits must be a result of the merger. For example, an Employee who is furloughed due to a decline in the freight business does not constitute being "adversely affected." Also, an Employee who voluntarily marks off from work cannot count the mark-off time in attempting to demonstrate that his earnings were less that the guarantee in the MPA. Time lost due to physical incapability to work is also excluded from the earnings guarantee.

In examining the question of whether the claimants' evidence shows that the claimants were "adversely affected" by the consummation of the merger, all evidence pertinent to this facet of the case has been assessed. None of this evidence tends to demonstrate that the requisite condition has been fulfilled.

The testimony of Mr. Christ Steimle, the only hearing witness who returned to work 456 524), made reference to his IRS W-2 for calendar year 1967 (CX 11) for the purpose of showing that he was employed by the New York Central Railroad Company (T. 457). His testimony about his earnings was to the effect that after he reported for work in the Freight Yards, there were days when he would get up to seven (7) phone calls telling him be was displaced and that he would go four (4) to six (6) consecutive days without work (T. 467); and that he never had regular employment until 1925 (T. 475).[8] He said that when 2.5% of the freight yard. jobs were first allocated to the CUT Employees[9], the 2.5% applied to

over a hundred jobs, but that over the years the jobs went down so that ultimately the allocation yield ed only one job to the CUT men with two (2) men on it (T. 470).

Mr. Steimle said that he applied for wage guarantee benefits under the MPA while working in the Freight Yards and that he never got a "reply back" (T. 476). He stated further that he turned in wage guarantee forms three (3) or four times, that he inquired about the wage guarantee, and was told that he *was* not protected (T. 477). Mr. Steimle said that other Employees, the NYC men, received guarantee payments, but he did not (T. 489); that he did not go to a company person and ask why he was not getting guarantee payments, he just kept turning in the guarantee forms T. 490); that after filing about the sixth guarantee form, he did not file them anymore (T. 495); and that he did not retain copies of his filings (T. 497)

There was no response at all to his submitting the forms, Hr. Steimle testified, no rejection, no denial, no action of any kind, and he never made a protest or filed a grievance (T. 490). He also stated that he did not ask assistance, from the Union because he "...assumed by then that I wasn't entitled to it...."(T. 492); that "I just took it for granted that I wasn't entitled to it and I didn't push it."; and that he guessed that he was eligible for a guarantee (T. 509 & 510). He also stated that he did not know about Messrs. Day and Senko did about filing guarantee forms, but that he knew Mr. Tomczak turned them in and did not push it when he got no reply.

In assessing Mr. Steimle's testimony on the adverse affect question, several fundamental deficiencies are found. The first deficiency is that since Mr. Steimle did not know what the amount of his wage guarantee was, it is not possible to determine whether his earnings were less than the guarantee. He also mentioned loss of jobs due to declining business and a physically incapacity finding of August 22,

1969, both of which are exclusions from the guarantee payment. But most important, Mr. Steimle said that after filing guarantee forms on about six (6) occasions he stepped filing the forms because he took it for granted that he was not entitled to the guarantee and he did not file a grievance. Mr. Steimle's conclusion that he was not en titled to wage guarantee payments was made in the context of the information within his knowledge at that time, 1969-1970, which gives rise to the logical inference that Mr. Steimle held the belief at that time that he was not entitled to wage guarantee payments and that his belief had a sound fact basis.

Moreover, since Mr. Steimle actually filed claims for wage guarantee payments under the MPA he was entitled to pursue that filing under the arbitration procedures provided by the MPA. But Mr. Steimle did not file a grievance. He thus forfeited his rights to pursue his wage guarantee claim and there is no sound basis on which this Committee could award a remedy that attempts to resurrect those rights.

It is therefore found that the testimony of Mr. Steimle and the evidence in the record as a whole does not establish a prima fade case that Claimant Steimle and the other Claimants who returned to work fulfilled the condition of being "adversely affected" as a result of the merger and that in consequence it is further found that the preponderating evidence of record does not 2stablish that these Claimants were "adversely affected" by the merger within the meaning of that phrase in Section 1 (a) of the MPA[10]

Accordingly, the claims of the Claimants who returned to work will be denied.

* * * * * * * * * * *

B. The Claimants Who Did Not Return To Work

The position and arguments submitted in the parties'

pre-hearing and post-hearing briefs will not be discussed point by point. Instead the facts and the Committee Findings will be presented under the following topical headings:

1. Offers of Work and Claimants' Response

2. July 11, 1969 Agreement/NPA Provision On Available Work

3. Anticipatory Breach

4. Non-Comparability Of Work Offered

5. Conclusion

1. Offers of Work and Claimants' Response

The Carrier's offers of work to Claimants began with the Carrier's furlough notice dated February 21, 1968 under which a total of twenty-nine (29) New York Central Employees, including Claimants, were notified that the Extra List of Yardmen at Cleveland Union Terminal's Company was being reduced effective February 25, 1968 and that all the named Employees were furloughed at that time. The notice stated that:

> "You *have* rights in the Cleveland Freight Yard Territory by virtue of Agreement effective February 16, 1965[11] and may stand for employment in the Freight Yard Territory. You should immediately contact General Yard Master D. J. Weisbarth." (CRX MI-2)

Seven (7) of the' Claimants made no attempt to exercise their seniority to positions in the Cleveland Freight Yard Territory.

By letter dated May 2, 1969,[12] signed by D. J.

Weisbarth, General Yardmaster, the Penn Central Company recalled all claimants to service. The notice informed the Claimants that they stood for work in the former NYC Cleveland Terminal Freight Yard, and that 'they were recalled to service in said freight yard territory within fifteen (15) days or by May 20, 1969. The pertinent passage in the May 2, 1969 recall notice reads as follows

(CX 43):

> "...Your seniority in the former NYC Cleveland Terminal District (Freight Yard) is such that you now stand for work *in* that territory. You are hereby recalled to *active* service in said freight yard territory and you have fifteen (15) days or until May 20, 1969, to report for service. Failing to do so you *will* forfeit all seniority on the Cleveland Union Terminals Company as well as on the Penn Central unless, of course, you are unable to pass the required return to service physical examination at this time."

The May 2 recall notice was the subject of a May 7, 1969 letter from Claimant Raymond Beedlow to General Yardmaster Weisbarth (CX 46; CRX J1), and a May 16, 1969 letter from Mr. C. L. Stalder, Penn Central Superintendent-Labor Relations and Personnel **to** Mr. Beedlow (CRX J2). Mr. Beedlow's Hay 7 letter express ed concern about several matters including Whether his marking up in the Freight Yard with a seniority date of September 10, 9 would affect his right to "protective benefits".[13] His letter stated in pertinent part as follows:

> "...Will you please inform me of the effect the mark-up for service in the Freight Yard will have on my 'working seniority' date on the NYC CUT Yardmen's roster?

Will this mark-up for service in the Freight Yard with a seniority date as of September 10, 1964 affect my right to 'protective benefits' under the terms of the Merger Agreement between the NYC and PENN RR companies, as provided in the Washington Job Protection Agreement?

If the mark—up in the freight Yard gives me no protective status with respect to my seniority date on the NYC CUT Yardmen's roster, then please accept this letter as notice to the Penncentral Transportation Co. of my intention to have the benefits of the 1936 Washington Job Protection Agreement applied to my present employment and status as an employee of Penncentral.

Article 9 of the February 16, 1965 Agreement specifically provides that it was for the sole purpose of

> 'combining the present separate seniority rosters and will not change the application of any joint or separate agreements now in effect between any or all of the parties and will not be construed to change the respective seniority districts or territories in any way.'

May I assume that this provision still applies to my seniority on NYC CUT Yardmen's Roster?.. ."

The May 16, 1969 letter of Superintendent Stalder (CRX J2) replied as follows to the Claimant's May 7, 1969 letter:

"(1) Your marking up for service in the Freight Yard will not affect your 'working seniority' date on the Cleveland Terminal Yard Service Employees' Roster;

(2) Your marking up for service in the Freight Yard, with a seniority date of September 10, 1964, will not affect any rights presently held by you, if any to any 'protective benefits' under the terms of the Merger Agreement between the New York Central - Penn Central, as provided for in the Washington Job Protected Agreement;

(3) Your marking up in the Freight Yard will continue to protect your seniority on the Cleveland Terminal Yard Service Employees' Roster, your prior right roster;

(4) Memorandum of Agreement, dated February 1, 1965, provides for the 'top and bottom of the N.Y.C. Cleveland Terminal District freight roster and the C.U.T. yard service employees' roster'; although only one roster is published, your status in well defined by this Agreement.

(5) There are no changes in the provisions of Article 9 of the February 16, 1965 Agreement."

Twelve (12) Claimants reacted to Mr. Stalder's May 16 letter by signing a May 19, 1969 letter stating, inter alia, that

(CRX 1-J-3):
"With a full reservation of all my employment and seniority rights, and without waiving any of them, I am reporting to service as you have commanded, in order that I may not necessarily jeopardize my employment and seniority rights."

Six (6) of the Claimants who signed this letter returned to work; the other six did, not.

Confronted with the continued refusal of a number of Claimants to respond to the May 2, 1969 recall notice, the Carrier's Superintendent of Labor Relations wrote to the Claimants' Union Representative, General Chairman J. A. Lyons, on August 22, 1969 extending a third offer of work to the non-returning Claim ants (CRX K).

This letter said that three (3) Claimants who had been found physically unable to work (Steimle, Potosky, and Mc Laughlin) would be reinstated to the seniority roster. Five (5) Claimants (Gentile, Tomczak, Potosky, Beedlow, and Doran) would be reinstated due to extenuating facts provided they returned to active service before September 15, 1969. The reinstatement of the remaining three Claimants (Tannebaum, Grady, and Augustus) would be discussed on the condition that they also return to active service before September 1969.

The Carrier's August 22, 1969 letter was the subject of an August 25, 1969 letter from General Chairman J. A. Lyons to Local Chairman Henry Anderson, with copy furnished to all Claim ants. In this letter Nr. Lyons stated that a protection agreement covering CUT Yardmen had been reached, and that the Carrier could not be expected to extend the September 15, 1969 deadline for the Claimants to return to work. The August 25 letter of Mr. Lyons states, in pertinent part, as follows (CRX 12):

> "...every group of men represented by this Committee is required to exercise their seniority within their home terminal or forfeit their seniority. If a leave of absence is granted, it is limited to 90 days as provided in Article 17 of the yard agreement. Roadmen are covered by Agreement dated November 27, 1931. Their rule reads in part, ----, Failing to report ----, they will be taken off the seniority roster.'

In most cases it is the Local Chairman and the Local who enforce the rule rather than the Company.

Due to circumstances involved, this Committee prevailed on the Company to waive all the agreements involved until such time as we were able to resolve our dispute involving protective agreements for the CUT Yardmen. Such an agreement was recently made.

Each of the yardmen mentioned in Mr. Stalder's August 22, 1969 letter are being furnished a copy of his letter so that they are made aware of their present status. As you know, they. are also listed on the Penn Central District 4 seniority roster where approximately 3000 names appear. As there are four (4) General Chair men and numerous Local Chairmen involved who have joint jurisdiction over that roster, we can not expect any further extension of the time limit beyond September 15, 1969. It is therefore necessary that all concerned make themselves available and comply with all existing agreements before that date it they desire to retain their seniority."

By letter dated December 15, 1969, the Carrier sent a third and last recall notice to the Claimants who as of that date had not returned to work. The letter, signed by General Yardmaster J. Cala, stated that by mutual agreement with General Chairman Lyons, the Carrier was agreeable to restoring the Claimants' seniority provided they return to work presently available in the Cleveland Union Terminal within fifteen (15) days from the date of the notice. The letter, in pertinent part, reads as follows (CRX L):

"Because of extenuating circumstances and by mutual agreement with your Gen. Chairman, Mr. J. A. Lyons, the Carrier, without prejudice to either party,

is agreeable to restoring your seniority provided you accept this return-to-work notice of work presently available in the Cleveland Union Terminal.

* * *

In the event you are subsequently furloughed front the C.U.T. list, you will be compelled to exercise your prior right and/or Penn Central seniority according to the Agreements.

You have 15 days from the date you are notified according to your Agreement Appendix 'L' to report for service,"

The Claimants to whom the December 15, 1969 letter was sent, did not return to work.

In assessing the information of record concerning the recall notices and related correspondence, it is pertinent to note that ten (10) Claimants returned to work between February 21, 1969 and December 31, 1969, and that seven (7) Claimants did not return to work at any time after the February 25, 1969 effective date of the February 21, 1969 furlough notice.

In sum, approximately twenty-one (21) months elapsed between February 25, 1968 and December 1969, and approximately five (5) months elapsed between the Claimants' obtaining MPA coverage on July 11, 1969 and the last recall notice in December 1969. None on the seven Claimants returned to work at any time in. these time periods.

2. July 11, 1969 Agreement/MPA Provision On Available Work

The dispute about the MPA coverage of the CUT

Claimants was disposed of by the July 11, 1969 Agreement which resolved the question of the claimants' MPA coverage favorably to the claim ants. The language in the July 11, 1969 Agreement that provided this favorable resolution is found in paragraph 7 of said Agreement reading as follows:

> "7. ...it is understood and agreed that Cleveland Union Terminals company yard service employees affected by this merger of the Cleveland Terminal will, effective on the date this agreement is consummated, become subject to all the terms and conditions of the Merger Protective Agreement between the former New York Central, the former Pennsylvania and the former Brotherhood of Railroad Trainmen. ..."

The July 11, 1969 Agreement brought the claimants under the coverage of the MPA and concurrently made the restrictive conditions in the MPA applicable to the Claimants' rights to payment of benefits by reason of such coverage. Since the Claimants refused to return to work, for a contended reasonable basis, the MPA restrictive condition that must be construed and applied to this case is the provision requiring covered Employees to accept available work in order to qualify or maintain eligibility for MPA benefits.

Said provision, found in Section 1 of the MPA in pertinent part, reads as follows:

> "Section 1.
>
> * * *
>
> An employe shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation, rules, working condition, fringe benefits, or rights and privileges pertaining thereto in case of his resignation, death, retirement,

dismissal for cause in accordance With existing agreements, or failure to work due to disability or discipline, or failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements. (Underline added)

3. Anticipatory Breach

The doctrine and principle of anticipatory breach is not applicable to a collective bargaining contract such as the MPA.

Simply because the Claimants had the view that the Carrier was not going to honor its obligations to them under MPA does not justify the Claimants decision not to return to work. Moreover, the contention that marking up would have been a futile gesture because there were not enough jobs there for Claimants, is simply not the kind of decision that can serve as a basis for requiring carrier to pay MPA benefits. The decision not to mark up was made unilaterally and prospectively without any demand that the Carrier prove the existence of work and without opportunity for the Carrier to participate in the question of whether the Claimants should return to work or be paid MPA guarantees.

If the Claimants thought the Carrier intended to deprive them of their MPA rights and benefits, this was all the more reason why they should have returned to work and thereby put the Carrier to its proof of whether work did in fact exist.

There are no exceptions to the exclusionary provision in the MPA regarding refusal of available work. The claimants acted at. their peril in deciding unilaterally not to return to work for the reason that there was no work for them at the Freight Yards; they made a decision against their best

interest and that decision cannot be undone in this proceeding.

As is the case with labor-management contracts generally, the MPA has its internal procedures for enforcement of the Employee rights created by the MPA. If a dispute arises between the Employee and Management about claimed benefits, the dispute is required by the MPA to be submitted to arbitration. The remedy for the prevailing Employee, who receives payments for benefits, is in part based on the fact that the Employee was available for work and that no work was offered to him. That is the beginning and end of it.

The Claimants' arguments concerning anticipatory breach are rejected.

4. Non-Comparability Of Work Offered

The contended non-comparability of the Freight Yard work and the work covered by the 1959 recall notices, after careful study, assessment, arid analysis of the record, is rejected as an excusable reason and justification for the Claimants' refusal to respond to the 1969 recall notices. This conclusion necessarily follows by reason of the content of the February 11, 1965 "Top and Bottom" Agreement and the significance that must he given to that Agreement.

The February 11, 3965 "Top & Bottom" Agreement, negotiated by the legally authorized bargaining agent of the Claim ants, the Brotherhood of Railroad Trainmen, extended the work jurisdiction of the CUT Employees, including Claimants, to encompass the switching jobs in the former NYC Cleveland Terminal Freight Yard. The Claimants have attacked the "Top & Bottom" Agreement on various grounds, including the subject at hand respecting non-comparability of

the work in the freight yards. However, notwithstanding the Claimants' criticism of the "Top & Bottom" Agreement, the confronting record reveals no basis on which that Agreement could be found to be inapplicable to the Carrier's 1969 recalls of the Claimant to work. It is concluded therefore that the claimants were obligated to respond to the recalls and to mark up for the freight yard jobs that they stood for under the "Top & Bottom" Agreement, without regard to whether the jobs offered were comparable to the Claimants' CUT jobs. In short, the fact that the "Top & Bottom" Agreement gave the claim ants jurisdiction over freight yard. work precludes a finding that such yard work was not comparable employment to the Claimants' CUT employment.

Moreover, aside from the "Top & Bottom" Agreement's decisive impact on the question of comparable employment, the con fronting record does not persuade that the freight yard jobs did not constitute comparable work to the Claimants' CUT work. Both passenger yard switching and freight yard switching are performed by the Brakeman/Trainman craft. The same safety rules apply to the passenger yard and the freight yard. Training for and experience in one yard is interchangeable with performing work in the other yard. The jobs in both the passenger and freight yard entail switching and shoving railroad cars to and from various tracks and yards. The content of the passenger and the freight yard jobs was quite comparable and the Claimants' contrary contention is rejected.

This finding is not dispelled by the October *22,* 1968 finding in an unemployment compensation proceeding that the Claimants Were available for work (CX 60). The Referee in that proceeding expressly stated that --

> "...in view of their questionable and apparently unresolved status as protected employees under the Penn Central Merger Agreement, it is

understandable that these appellants night have some trepidation about accepting work at the Collingwood Yard...."

This ruling was made before the NPA benefits were made applicable to the Claimants by the July 11, 1969 Agreement and the Referee who made this ruling was not required to construe and apply the MPA provision that required Employees to accept avail able work in order to preserve entitlement to MPA benefits. In deed, the ruling was made before the July 11, 1969 Agreement made the MPA benefits applicable to the Claimants and hence the Referee was not required to take the fact of MPA coverage into account in making the ruling. The ruling in the unemployment compensation proceedings thus has no significance in determining the issue in this case.

5. Conclusion

The refusal of the Claimants to return to work, between February 21, 1968 and December 31, 1969, originated from the Claimants' concerns about the Carrier's position prior to July 11, 1969 that the Claimants were not covered by the MPA of January 1, 1964. Some of the claimants had over twenty (20) years invested in work for a single Railroad Carrier; the economic implications of whether Claimants' jobs would be secure under the prospective merger, was probably extremely difficult for anyone to comprehend. Therefore, the frustration felt by the Claimants in 1964 and afterwards because of their view that it was apparently impossible to get a resolution of their claims of entitlement to MPA benefits, is understandable.

However, the uncertainty about the coverage of the Claimants under the MPA was resolved favorably to the Claimants by the July 11, 1969 Agreement. This Agreement

opened the way for the Claimants to file claims under the MPA and in fact all of the Claimants could have tiled claims under the MPA as early as 1968 or 1969.

But, except for the claim filings mentioned by Mr. Steimle, the claimants did not apply for benefits and guarantees available to them under Section 1 (a) of the MPA,[14] and the Claimants did not accept the July 11, 1969 Agreement as resolving their problem about MPA benefits: they had negative views and doubts about the benefits that would be forthcoming from the July 11, 1969 Agreement and the MPA of 1965.

The Claimants had opportunity to test their negative views by returning to work in response to the offers bf work in the February 21, 1968 furlough notice and the 1969 recall not ices. By the action of returning to work, the Claimants could have put the Carrier to its proof that the offered work was concrete and actual and not illusory. If they had returned to work the Carrier would have been required to assign them to jobs or to acknowledge that no jobs existed. The claimants did not return to work, however, and their failure and refusal to return to work brought them into conflict with the provision in the MPA that re quires Employees to accept available work in order to qualify or maintain eligibility for MPA benefits.

Said provision, found in Section 1 (b) of the MPA, in pertinent part, reads as follows:

> "Section 1 (b).
>
> * * *
>
> An employe shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation, rules, working condition, fringe benefits, or rights and privileges pertaining thereto in case of his resignation; death, retirement,

> dismissal for cause in accordance With existing agreements, or failure to. Work due to disability or discipline, or failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing or agreements. (Underline added)

The claimants were required by this provision to accept available work in order to qualify for NPA benefits. They did not do so and there the matter must rest.

The Claimants arguments in support of their contended reasonable basis and justification for not returning to work are found unpersuasive and not supported by the record evidence. Therefore, and on the basis of the confronting record, it cannot be said that the Claimants have met their burden to prove the validity of their claims by the preponderance of the evidence of record.

Accordingly, the claims of the Claimants who did not return to work will be denied.

DECISION AND AWARD

In view of the foregoing and based on the record as a whole, it is found that the preponderating evidence in the record as a whole does not establish the validity of the claims of the Claimants who returned to work pursuant to the Carrier's 1969 recalls to work; and the preponderating evidence does not establish the validity of the claims of the Claimants who refused to accept available work offered them in the furlough notice, effective February 25, 1969, and who refused available work offered then in recall notices issued by the Carrier in 1969.

Accordingly, the claims are hereby denied.

Fred Blackwell, Chairman/Neutral

Wallace R. Steffen
Claimants' Member

Jeffrey H. Burton
Carrier Member

Executed on_____, 1992

FOOTNOTES

[1] Exhibit designation: CX is Claimants' Exhibit; CRX is Carrier's Exhibit; JX is Joint Exhibit.

[2] About 30 to 40 CUT Employees were retained in the CUT work force reduction accompanying this furlough notice, according to the testimony of Claimant Beedlow (T. 524).

[3] Although deaths, retirements, and physical inability to work, which preclude payment of MPA benefits under Section 1 of the MPA, occurred in respect to some of these Claimants, no attempt is made here to note the names of the deceased, the retirees, and the physically incapacitated.

[4] This was the position of all Claimants, those who returned to work and those who did not.

[5] All authorities submitted by the representatives of the parties have been read and considered in the study of this case

[6] The arguments in behalf of these Claimants are that they complied with all applicable agreements but obtained only

sporadic employment despite their desire to work full time, that they earned less than their MPA guarantees, and that the Carrier has wrongfully refused to provide MPA benefits to these Claimants.

[7] Citations for this fundamental proposition are deemed unnecessary.

[8] He said that he was junior to all of the furloughed men who had not returned to work (T. 469), which, implies that the non-returnees would have at least stood *for* the work performed by Steimle.

[9] The 2.5% allocation was made by the February 16, 1965 Agreement.

[10] Likewise, the earnings data in the W-2 Forms of Mr. Tomczak and Mr. Benko (T. 341 & 342) do not establish a prima facie case that these claimants were adversely affected within the meaning of the MPA. The evidence does not establish the amounts of the wage guarantees or whether they were voluntarily marked off.

[11] The "Top & Bottom" Agreement.

[12] General Chairman Lyons wrote to the Claimants regarding the May 2, 1969 recall notice, urging them to respond to work within the time specified in the notice and stating that he was confident that the Union would obtain merger protection for the claimants, including a guaranteed monthly wage (CRX M11).

[13] Although this May 7 and 16 exchange of correspondence was between the two named individuals, the correspondence appears to have been shared with all Claimants.

[14] In fact, the Court made the decision to submit such claims

to arbitration under the MPA in Court order dated November 29, 1979 (CX *55)* and the parties submitted the claims for arbitration under the MPA by Agreement For Arbitration dated June 11, 1980.

United States Code
TITLE 49 - TRANSPORTATION
SUBTITLE IV - INTERSTATE TRANSPORTATION
PART A - RAIL
CHAPTER 113 - FINANCE
SUBCHAPTER II - COMBINATIONS

U.S. Code as of: 01/05/99
Section 11326. Employee protective arrangements in transactions involving rail carriers

(a) Except as otherwise provided in this section, when approval is sought for a transaction under sections 11324 and 11325 of this title, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976, and the terms established under section 24706(c) (FOOTNOTE 1) of this title. Notwithstanding this part, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Board (or if an employee was employed for a lesser period of time by the rail carrier before the action became effective, for that lesser period).

(FOOTNOTE 1) See References in Text note below.

(b) When approval is sought under sections 11324 and 11325 for a transaction involving one Class II and one or more Class III rail carriers, there shall be an arrangement as required under subsection (a) of this section, except that such arrangement shall be limited to one year of severance pay,

which shall not exceed the amount of earnings from the railroad employment of that employee during the 12-month period immediately preceding the date on which the application for approval of such transaction is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of that employee with the acquiring carrier during the 12-month period immediately following the effective date of the transaction. The parties may agree to terms other than as provided in this subsection.

(c) When approval is sought under sections 11324 and 11325 for a transaction involving only Class III rail carriers, this section shall not apply.